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No. 80-2162

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,

Appellants,

v.

BUREAU OF REVENUE, STATE OF
NEW MEXICO,

Appellee.

ON APPEAL FROM THE COURT
OF APPEALS OF NEW MEXICO

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS

There are a substantial number of Indian reservations and tribal Indians in the State of California. California has been and is involved in litigation over limitations on California's power to tax non-Indians buying cigarettes (The

Chemehuevi Indian Tribe v. California State Board of Equalization, U.S.D.C., ND Cal. No. C77-2838-REP) or otherwise doing business with Indians on Indian land. (See e.g., Fort Mojave Tribe v. San Bernardino County 543 F.2d 1253 (1976); Agua Caliente Band of Mission Ind. v. County of Riverside 442 F.2d 1184 (1971).)

Much valuable Indian land is the subject of commercial development in California. Alternating sections underlying the City of Palm Springs, California, are Indian lands. (See Agua Caliente Band etc, supra, at p. 1185.) Much of this Indian land has been and is being leased long-term to non-Indian developers and businesses. Major stores and other businesses owned and operated by non-Indians, located on Indian land, serve the same mostly non-Indian general public, receive the same benefits from the State

of California, and should pay the same taxes to the State of California as their competitiors in the next block who are not located on Indian land.

California is particularly concerned with ramifications of suggestions that state taxes, the legal incidence of which is on non-Indians who enjoy the benefits of state government, is prohibited because the ultimate economic burden of the tax may be contractually passed on to the Indian consumers or Indian property owners.

CALIFORNIA CONCURS WITH MONTANA, ARIZONA AND WASHINGTON

While time has not permitted thorough review of the final Amicus Curiae brief to be submitted by Montana, Arizona and Washington, California generally concurs in their arguments (so will try not to repeat them here).

"LEGAL INCIDENCE" SHOULD BE THE GENERAL TEST OF TAXATION OF NON-INDIANS DOING BUSINESS WITH INDIANS OR ON INDIAN-OWNED LAND

"Legal incidence" as used by this Court in a number of cases[1] is a clear, definitive and workable test of who pays a tax. Legal incidence is determined by the taxing authority. On

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1. Many deal with tax on the United States itself. (See Alabama v. King & Boozer (1941) 314 U.S. 1; First Agricultural Nat. Bank v. Tax Comm'n, 392 U.S. 339 (1968); W. M. Gurley v. Arny Rhoden, Etc (1975) 421 U.S. 200; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599.) Federal attorneys, however, are trying to get this Court to return to an economic burden test, eliminating "legal" from the test and invalidating state taxes where all legal obligations and incidents of the tax are on the taxable persons and the parties shift by contract the economic burden to a tax immune entity. (See Cal.State Board of Equalization v. U.S.A., appeal to U.S. Supreme Court pending, #81-1000.) Here the federal government provided the funds (Ramah Navajo School Bd. v. Bureau of Revenue N.M., N.M. App., 625 P.2d 1225 at p. 1227), and thus bears the actual economic burden.

the other hand, the "economic burden" of every tax is normally passed along as part of the price of a product or service to the ultimate purchaser or user. The manner, extent and form by which this occurs is subject to the contractual arrangements and economic bargaining situations of the parties. States have little, if any, control over the power of private parties to characterize and shift the (apparent or real) burden of a tax. Thus, private parties can manipulate the apparent (and probably real) economic burden. Where "economic burden" is a substantial or primary consideration in determining immunity from a tax, the contracting parties can manipulate their contractual relations and create immunities thereby.

Thus, in the instant case, the economic burden of state and local taxes

imposed by another state on the manufacturer of electrical fixtures manufactured outside New Mexico and used by appellant Lembke in the contract in issue here, is just as much on the Indian appellant as is the tax in issue. Should all such taxes be prohibited? Where is the "economic burden" line to be drawn?

Here the federal government provided all the funds (Ramah Navajo School Bd, etc., supra, 625 P.2d at p. 1227), and thus, bore the real burden of the state tax in issue. Federal funds probably bear much of the expenses paid by Indians including any state tax which is part of the price. This is further reason for applying the same "legal incidence" test when dealing with Indians on reservations as applied when dealing with the United States itself.

This Court should consider that reservation Indians, especially in California, are less and less isolated from activities of non-Indians off the reservations; the younger Indians are increasing their participation in normal state and local activities and are taking advantage of more and more benefits offered by state and local governments. Barriers should not be erected, and ancient animosities exacerbated by unnecessarily treating indians differently from other citizens.

The taxpayer here, Lembke, clearly receives full benefit of New Mexico state and local government. He should pay his taxes like anyone else. The fact that his costs of doing business, including his taxes, are passed on as part of his price to his customers, should not excuse his payment of such tax because his customer here is a tax exempt Indian

group (which is not itself taxable), and the final construction activities are performed on Indian land.

CONCLUSION

The state tax in issue on a non-Indian who receives substantial benefits from the state is not invalid because the economic burden was contractually passed on to Indians.

Respectfully submitted,

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